Office-Supreme Court, U.S.
FILED
FEB 5 1981
ALEXANDER L. STEVAS,
CLERK

80-1325

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,

Petitioner,

v.

TED M. AKIN and GLORIA DAHL AKIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

BICKEL AND CASE
THOMAS L. CASE
5441 First International Building
Dallas, Texas 75270
1-214-651-8545
Counsel for Petitioner

QUESTION PRESENTED

Petitioner, hereinafter called "Dahl", is an elderly Texas widower who planned to remarry. The Respondents, hereinafter called the "the Akins", are Mr. Dahl's daughter and son-in-law, both of whom vehemently opposed Dahl's remarriage, fearing diversion of his estate. When the Akins' remonstrances failed to dissuade Dahl from remarrying, the Akins resorted to two unconstitutional Texas statutes — the Texas Probate Code, §131(b) (Vernon 1956) and the Texas Mental Health Code. Tex. Rev. Civ. Stat. Ann. art. 5547-27 (Vernon Supp. 1980). By means of false ex parte representations, the Akins persuaded Texas courts to appoint Gloria Akin as guardian of Dahl's person and estate and to institutionalize Mr. Dahl in a mental hospital. Based upon the false, ex parte representations, the Akins gained control of Mr. Dahl's person and estate and had him incarcerated in a mental institution. The Akins accomplished this by means of the Texas Probate Code, the Texas Mental Health Code, two Texas courts, two Texas judges, and Texas peace officers. Thus, between the Akins and the overt involvement of Texas public officials, Mr. Dahl was deprived of his liberty and property without due process of law. The question presented to this Court is whether or not the Akins were acting under color of state law under 42 U.S.C. §1983.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. George Leighton Dahl
2. Ted M. Akin
3. Gloria Dahl Akin

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
LIST OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	14
PROOF OF SERVICE	15

LIST OF AUTHORITIES

Page

CASES:

Adickes v. Kress & Co., 398 U.S. 144 (1970)..... 5,13

Dennis v. Sparks, ... U.S. ....., 101 S. Ct. 183 (1980).. 4,11

Dieffenbach v. Attorney General of Vermont, et al, 604 F. 2d 187 (2d Cir. 1979)..... 9

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)..... 5,6,7,8,9,10,12,13

Fuentes v. Shevin, 407 U.S. 67 (1972) 6,7,9,13

Gomez v. Toledo, ... U.S. ....., 100 S. Ct. 1920 (1980)... 14

Henry v. First National Bank of Clarksdale, 595 F. 2d 291 (5th Cir. 1979) cert. den. 444 U.S. 1074 11,12

Lynch v. Household Finance Corp., 405 U.S. 538 (1972)..... 7

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)..... 6,7,9,10,13

Owen v. City of Independence, Mo., ... U.S. ....., 100 S. Ct. 1392 (1980)..... 14

Shelley v. Kraemer, 334 U.S. 1 (1948)..... 7

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)..... 6,7,9,10,13

United States v. Price, 383 U.S. 787 (1966)..... 13

United States v. Wiseman, 445 F. 2d 792 (2d Cir. 1971) cert. den. 404 U.S. 967 9,11

Virginia v. Rives, 100 U.S. 313 (1879)..... 7

Page

STATUTES:

18 U.S.C. §2 11
18 U.S.C. §242 11
28 U.S.C. §1254(1) 1
28 U.S.C. §1331 2
28 U.S.C. §1343 2
42 U.S.C. §1983 2,5,6,7,8,11,12,13,14
Texas Mental Health Code i,2,3,12
Texas Probate Code, Section 131(b) (Vernon 1956) i,2,3,12

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,

Petitioner,

v.

TED M. AKIN and GLORIA DAHL AKIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

To the Supreme Court of the United States:

OPINION BELOW

There was no formal opinion of the district court. The opinion of the Fifth Circuit is reported at 630 F.2d 277. It is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the court of appeals (Appendix page A 1) was entered on November 10, 1980. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 (West 1974) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Dahl brought suit against the Akins in the United States District Court for the Northern District of Texas, asserting a damage action against them under 42 U.S.C. §1983, with jurisdiction being based upon 28 U.S.C. §1331 and §1343. On the Akins' motion, the district court dismissed Dahl's complaint on the ground that the Akins had not acted under color of state law. The United States Court of Appeals for the Fifth Circuit affirmed. Since the question presented is whether or not the Akins acted under color of state law, the following summary is appropriate.

In order to prevent Dahl's remarriage, the Akins instituted two separate and distinct court actions in the State of Texas, the state of Dahl's residence. First, the Akins succeeded in having Gloria Akin appointed the guardian of Mr. Dahl's person and estate, pursuant to the Texas Probate Code, §131(b). This was done ex parte and, based upon the false representations of the Akins, Gloria Akin was appointed temporary guardian of the person and estate of George Leighton Dahl by the Probate Court of Dallas County, Texas. §131 of the Texas Probate Code

permits this to be done ex parte, and it does not require that there ever be a hearing. If the application is not contested, the court can turn the temporary guardianship into a permanent one.

The Akins then instituted a second court action to have Dahl temporarily committed to a mental hospital. Based upon the false representations of the Akins, Joseph E. Ashmore, Judge of the Mental Illness Court of Dallas County, Texas, issued a writ to bring about the arrest and incarceration of Dahl in the psychiatric ward of Presbyterian Hospital in Dallas County, Texas.

Based upon the two foregoing proceedings, the Akins were able to have Dahl confined and incarcerated in a mental institution in Dallas County, Texas, where he remained for seventeen days; and the Akins gained total and complete control of Dahl's person and estate. All of this was accomplished by the Akins, with the aid of the Texas Probate Code, the Texas Mental Health Code, the Probate Court of Dallas County, Texas, the Mental Illness Court of Dallas County, Texas, and peace officers of the State of Texas. As a result of the Akins' actions, the courts issued certain papers and writs; and as a result of the papers and writs, the property and person of Dahl were seized and impounded without hearing, or an opportunity to be heard, by the affirmative requirements of the law of Texas.

ARGUMENT

The case involves the application of the Civil Rights Act of 1871. The Fifth Circuit Court of Appeals found that Dahl had been deprived of liberty and property without due process of law and that the State of Texas was involved in such deprivation. However, it held that Mr. Dahl had no cause of action for damages against the persons who set the state into action against him — the Akins. The opinion and judgment of the Fifth Circuit

seriously erodes the purpose of the 1871 Civil Rights Statute — preservation of human liberty and human rights. The 1871 statute aids that preservation by securing to those who are deprived of their liberty and rights a damage action against the offending party. The damages remedy is a vital component of any scheme for vindicating the deprivation of such constitutional guarantees. Dahl was deprived of these guarantees by the Akins, who, with knowledge of and pursuant to, the Texas Probate Code and the Texas Mental Health Code, set into action the State of Texas which, at the affirmative command of Texas statutes, placed control of Mr. Dahl's person and estate in the hands of the Akins and which deposited Mr. Dahl in a mental institution. Thus, without question, Dahl was deprived of his constitutional guarantees of liberty and property; however, the Court of Appeals denied him a damage action for such deprivation.*

In a nutshell, the Court of Appeals has held that:

1. Dahl was deprived of liberty and property without due process of law.

2. The State of Texas was involved in such deprivation.

3. The Texas Probate Code and the Texas Mental Health Code are unconstitutional, at least to the extent that they permitted deprivation of Dahl's constitutional guarantees.

4. The Akins caused the State of Texas to take the steps that deprived Dahl of his constitutional guarantees.

---

*Of course, the state judges would have absolute immunity in the damage action, and the peace officers would have, at least, a qualified immunity. However, the Akins have no immunity. *Dennis v. Sparks* .... U.S..... ,101 S. Ct. 183 (1980).

5. However, Dahl has no damage remedy against the Akins because the Akins did not act "under color of state law," which the Court of Appeals understood to mean that the Akins' actions must be attributable to the State of Texas, it not being enough that the Akins acted with knowledge of and pursuant to the Texas statutes.

In arriving at its decision, the Court of Appeals has rendered a decision in conflict with decisions of this Court and with decisions of the Second Circuit and with decisions within its own circuit.

In order to state a cause of action under 42 U.S.C. §1983, a plaintiff must prove that the defendant deprived him of rights secured by the Constitution and laws of the United States and that such deprivation was under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). In that case, this Court held that proof of those two elements entitled a damage recovery against a private individual causing such deprivation. The Court defined under color of state law as follows:

> "Whatever else may also be necessary to show that a person has acted under color of state law for the purposes of §1983, we think it essential that he acted with knowledge of and pursuant to that statute." *Id.* at 162 n.23.

In this Court's latest pronouncement of what constitutes action under color of state law, the Court has reaffirmed the above holding in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149,156 (1978). In that case, the plaintiff asserted a damage action under 42 U.S.C. §1983 based upon a proposed sale of goods entrusted to a warehouseman pursuant to the New York Uniform Commercial Code. This Court held that the complaint could fairly be read to allege knowledge on the part of the

defendants, inasmuch as the defendants had taken steps under the Uniform Commercial Code to sell the property.

However, the Court did not feel that the first of the two elements of an action under §1983 was present — deprivation of the rights secured by the Constitution and laws of the United States, to wit: state action. In order to prove such a deprivation, the Court held that the plaintiff, in the absence of overt official involvement, must show that Flagg Brothers not only acted under color of the challenged statute, but also that its actions were properly attributable to the State of New York. The Court found that their actions were not.

The Court was of the opinion that the overt involvement of state officials supplies the necessary state action. In this regard, this Court stated as follows:

> "It must be noted that respondents have named no public officials as defendants in this action. The City Marshal, who supervised their evictions, was dismissed from the case by consent of all parties. The total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditor's remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, (1975); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, (1969). *Id* at 1734.

In each of the foregoing cases cited by the Supreme Court in the *Flagg* case, there was a summary seizure of property by a state official who was set into action by a private individual. In each of the cases, state officials, at the instance and request of

creditors, seized property* of debtors without prior notice or hearing, on the strength of conclusory affidavits filed by the creditors. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), (pre-judgment garnishment without hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (pre-judgment replevin without notice or hearing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-judgment garnishment without notice or hearing). In each of the foregoing cases, the state action was overt as it is in this case.

In the *Flagg* case, this Court was careful to distinguish the facts before it from those in the foregoing creditors' cases:

> "This situation is clearly distinguishable from cases such as *North Georgia Finishing*, supra; *Fuentes*, supra, and *Sniadach*, supra. In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor. See *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1879); *Shelley v. Kraemer*, 334 U.S. 1, 63 S. Ct. 836, 92 L.Ed. 1161 (1948). *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 157, 160, n. 10 (1978).

---

*42 U.S.C. §1983 protects individuals from deprivation of property, as well as liberty, without due process. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

It is submitted that the facts of this case are indistinguishable from those of the creditor cases. In this case, government officials participated in the deprivation of Mr. Dahl's liberty and property, both of which had been his before the deprivation occurred. The Akins set into motion the process that caused the issuance of the writs; and as a result of the writs, Mr. Dahl's property was seized and turned over to Gloria Akin, and he was deprived of his personal liberty. The Akins invoked the authority of the Texas courts which in turn ordered Mr. Dahl's property seized and ordered Mr. Dahl incarcerated in a mental institution. Thus, the requirement of state action is met by the overt involvement of state officials, leaving the second element — action under color of state law.

It is upon the second element of a §1983 action that the Fifth Circuit erred, by misinterpretation of this Court's opinion in *Flagg Brothers*. The inquiry that this Court made in *Flagg Brothers* was as to the first element that a §1983 plaintiff must prove — deprivation of a right secured by the Constitution and the laws of the United States — in other words, the meaning of state action as that term is associated with the Fourteenth Amendment. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The Fifth Circuit found that Dahl's complaint properly alleged state deprivation of liberty and property without due process of law. 630 F. 2d 277, 280. However, a reading of the Fifth Circuit's opinion shows that it went on to impose requirements upon the second element of the §1983 action beyond any ever imposed by this Court.

The Fifth Circuit's opinion imposes the following burden on a §1983 plaintiff seeking recovery against a private individual — there must have been a deprivation of a right secured by the Constitution and laws of the United States (state action) and, irrespective of involvement of public officials, it must be shown that the private individual was, in essence, clothed with such

authority to make him tantamount to a state official by making the plaintiff prove that the defendant's acts were properly attributable to the state. However, this is the burden imposed by this Court in *Flagg Brothers* for a showing of state action in those instances where there is a complete lack of overt official involvement. It is submitted that this holding is in direct conflict with the holding of this Court in *Flagg Brothers, Fuentes, Sniadach* and *North Georgia Finishing*. In all those cases, the Court required that there be a showing of state action. State action was found in those instances where there was overt official involvement in the case. The Fifth Circuit has doubled the plaintiff's burden by requiring that there be both overt involvement of public officials and acts by the defendant attributable to the state, when, in fact, the requirement of action under color of state law is satisfied by showing that the defendant acted with knowledge of and pursuant to the state law.

The holding of the Fifth Circuit is also in direct conflict with *Dieffenbach v. Attorney General of Vermont, et al*, 604 F. 2d 187 (2d Cir. 1979) and *United States v. Wiseman*, 445 F. 2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967. In *Dieffenbach*, the appellant challenged Vermont's strict foreclosure law. The defendant bank had foreclosed upon a piece of property belonging to the appellant, pursuant to Vermont foreclosure statutes. These statutes directly engaged the state's judicial power in effectuating foreclosure by, among other things, requiring a mortgagee to go to court to obtain a decree of foreclosure. Additionally, the mortgagee was required to obtain a writ of possession from the court clerk and to gain possession of the property, the mortgagee was required to have a sheriff execute upon the writ. The defendant bank and the defendant bank officer, both private citizens, moved to dismiss the appeal on the ground that the strict foreclosure of the appellant's property would not constitute state action, thus depriving the court of subject matter jurisdiction.

In declining to do so, the Court found the requisite state action, and in discussing *Flagg Brothers,* the Court held as follows:

> . . . the Supreme Court evidently requires us to determine initially whether there is 'overt official involvement.' In *Fuentes,* for example, as in *Flagg Brothers,* the state law allowing for ex parte prejudgment replevin had been incorporated into the contract between debtor and creditor but, unlike *Flagg Brothers,* a clerk was required, at the creditor's request, to make out the writ of replevin pursuant to which the sheriff seized the property. Similarly, in *Sniadach* the statute required the clerk of the court to issue the summons at the request of a creditor's lawyer and in *North Georgia Finishing* the court issued the writ of garnishment based solely on an affidavit of the creditor. Although this seems to be a somewhat arbitrary method of differentiation we are bound to apply it. Here, although the private mortgage deed in effect incorporates the Vermont law of foreclosure, the law does require a mortgagee to go to court to obtain a decree of foreclosure, which the creditor then must record. The court or the clerk may render an accounting and the court has discretionary power to extend or limit the statutory period of redemption that follows the decree. Indeed, to obtain possession after the equity of redemption has expired the creditor must obtain from the clerk of the court a writ of possession which the sheriff must execute. Unlike the procedures in other states for non-judicial foreclosure under private power of sale, Vermont's strict foreclosure laws directly engage the state's judicial power in effectuating foreclosure. These official acts are certainly sufficient to give us jurisdiction over the appellant's claim that the strict foreclosure laws of Vermont are unconstitutional." *Id.* at 194.

The opinion of the Second Circuit emphasizes that *Flagg Brothers* dealt with the requirement of state action and not with the imposition of some additional standard upon action under color of state law, as the Fifth Circuit believed.

The case of *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967, involved an appeal from a conviction under 18 U.S.C. §242 and 18 U.S.C. §2 which are the criminal counterparts to 42 U.S.C. §1983. 18 U.S.C. §2 states whoever causes an act to be done, which if directly performed by another, would be an offense against the United States is punishable as a principal. 42 U.S.C. §1983 imposes liability for subjecting the person or causing the person to be subjected to a deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States.

In *Wiseman*, the defendants (private process servers) were charged with filing false affidavits of service of process with a court clerk, who in turn entered default judgments, pursuant to which executions were issued, thereby depriving innocent persons of due process. The Second Circuit found that the defendants were acting under color of law pursuant to 18 U.S.C. §242, without regard to whether the clerk knowingly participated with the defendants. The actions of the defendants in *Wiseman* are practically identical to the actions of the Akins in this case. It would be an incongruous result if the Akins could be found guilty of a crime by depriving Dahl of his constitutional rights and yet escape civil liability to him for the same action, since the proof required under 18 U.S.C. §242 is same as is required under 42 U.S.C. §1983. *Dennis v. Sparks*, ... U.S. .... , 101 S. Ct. 183, 187, n. 5 (1980).

Finally, the Court of Appeals' opinion is in direct conflict with *Henry v. First National Bank of Clarksdale*, 595 F. 2d 291 (5th Circuit 1979), cert. den. 444 U.S. 1074. In that case, the Fifth

Circuit found the requisite state action under 42 U.S.C. §1983 where a private party had procured a money judgment and was able to enlist the power of the state on his behalf in enforcing the judgment, as opposed to the situation where the court is merely a forum for the resolution of private disputes. The Texas Probate Code and the Texas Mental Health Code permit a private litigant to enlist the power of the state, ex parte, on his behalf in enforcing an order of temporary guardianship or an order of commitment. Indeed, §131 of the Texas Probate Code does not require that there ever be a hearing on permanent guardianship and permits the court to turn a temporary guardianship into a permanent one, without hearing. Thus, an order of temporary guardianship is tantamount to a final judgment under Texas law. When played hand in glove with the Mental Health Code, by confining a person in a mental institution, without a hearing or the right of a phone call, the temporary guardianship would become permanent in every case. Thus, the machinery of the Texas Probate Code and the Texas Mental Health Code provide the requisite state action, inasmuch as the Akins were able to enlist the full power of the state on their behalf in depriving Mr. Dahl of his liberty and property.

In its opinion in this case, the Fifth Circuit states that the *Henry* Court confused the state action requirement with that of color of state law. However, Dahl submits that it is the *Dahl* Court that has confused the two.

The Fifth Circuit has badly misinterpreted this Court's opinion in *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978). First, the Fifth Circuit has interpreted the burden under §1983 to be that not only must a §1983 plaintiff show overt official involvement, but also that the defendant's actions are properly attributable to the state. In fact, this Court has held under color of state law to mean that the defendant acted with knowledge of and pursuant to the state law. However, this Court has correctly

held that in order to prove the first element of a cause of action under 42 U.S.C. §1983 the plaintiff must show deprivation of a right secured by the Constitution and the laws of the United States, to wit — state action; and, in order to impose liability upon the private defendant under §1983, there must be overt official involvement, or in its absence, state action can be found only if the acts of private parties could properly be attributed to the state. *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 157 (1978). Thus, the Fifth Circuit's decision, if allowed to stand, would not permit an action for recovery of damages from a private individual under §1983 unless the plaintiff could prove both concepts of state action. It would prohibit any cause of action against a private individual jointly engaged with state officials, see *Adickes v. Kress & Co.,* 398 U.S. 144 (1970); *United States v. Price,* 383 U.S. 787 (1966); and any action against a private individual who brings about the constitutional deprivation through overt official involvement in the case, *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601; *Fuentes v. Shevin,* 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) unless the plaintiff could, in each instance, also prove that the defendant's actions were properly attributable to the state.

Thus, the Fifth Circuit has imposed requirements upon the second element of a §1983 action beyond any ever imposed by this Court. In effect, the Fifth Circuit has doubled a plaintiff's burden of proof by requiring that there be both overt involvement of public officials and by requiring that the defendant's acts be attributable to the state, thereby making the defendant tantamount to a public official. The Fifth Circuit's opinion seriously erodes the rights of a §1983 plaintiff to seek and secure damages against those who violate his constitutional guarantees. Since most public officials enjoy an absolute or qualified immunity, it would appear that the damages remedy would often be directed toward a private individual. However, the Fifth

Circuit now makes it twice as difficult to prove a damage action against a private individual. This flies directly in the face of the purpose of §1983, which is to aid in the preservation of human liberty and rights. At the heart of §1983 is a damage remedy. It is a vital component of any scheme for vindicating cherished constitutional guarantees. *Owen v. City of Independence, Mo.*, ... U.S. .... , 100 S. Ct. 1392, 1415 (1980). §1983 is to be construed generously in order to further its primary purpose. *Id.* at 1407-1408; *Gomez v. Toledo*, ... U.S. .... , 100 S. Ct. 1920, 1923 (1980). Despite this Court's instruction to generously construe §1983, the Fifth Circuit's opinion has imposed a quite narrow construction upon §1983; and, in fact, its opinion unduly restricts the scope of §1983 and unduly restricts a litigant's right of a damage action against a private individual causing the deprivation of constitutional guarantees.

CONCLUSION

For each and every of the foregoing reasons, Dahl respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on the 10th day of November, 1980.

Respectfully submitted,

BICKEL AND CASE
THOMAS L. CASE
5441 First International Building
Dallas, Texas 75270
Counsel for Petitioner

PROOF OF SERVICE

I, Thomas L. Case, one of the counsel for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I hand delivered three copies of the foregoing Brief for Petitioner on the 6th day of February, 1981 to Paul D. Schoonover, Esq. of Vial, Hamilton, Koch, Tubb, Knox & Stradley, 15th Floor, Republic National Bank Tower, Dallas, Texas.

/s/ THOMAS L. CASE

Thomas L. Case

APPENDIX

George Leighton DAHL,
Plaintiff-Appellant,

v.

Gloria Dahl AKIN and Ted M. Akin,
Defendants-Appellees.

No. 79-1409.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

November 10, 1980.

In a civil rights action brought by a father against his daughter and her husband, the complaint was dismissed, on defendants' motion, by the United States District Court for the Northern District of Texas at Dallas, Robert M. Hill, J. On appeal by the plaintiff father, the Court of Appeals, James C. Hill, Circuit Judge, held that allegations that the daughter and her husband through court proceedings and in deprivation of due process secured plaintiff's confinement in mental hospital did not allege conduct taken "under color of" state law, and thus did not state claim for relief under 1871 civil rights statute, despite contention that daughter initiated commitment proceedings in her official capacity as state-appointed guardian.

Affirmed.

1. Civil Rights — 13.12(7)

In determining whether plaintiff stated claim cognizable under 1871 civil rights statute, it was necessary to inquire first whether plaintiff had been deprived of rights secured by Constitution and laws and, in order to determine whether rights were "secured by" Fourteenth Amendment, to find allegation that state was "involved in" their deprivation. 42 U.S.C.A. §1983; U.S.C.A.Const. Amends. 14, 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. Civil Rights — 13.5(2)

Whatever other judicial action may constitute "state action," for purposes of alleging constitutional deprivation in claim for relief under 1871 civil rights statute, failure of procedural due process does. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Civil Rights — 13.12(3)

"Procedure" constitutes inherently judicial responsibility, and complaint that plaintiff's daughter and her husband had secured plaintiff's confinement in mental hospital through court proceedings by which plaintiff was deprived of due process was sufficient to allege state deprivation of liberty and property without due process of law, for purposes of stating claim for relief under 1871 civil rights statute, through it yet remained to be determined whether constitutional injury had been caused by persons acting "under color of" state law. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; Vernon's Ann.Civ.St. arts. 5547-27, 5547-31, 5547-33; V.A.T.S. Probate Code, §131(b).

4. Civil Rights — 13.5(1)

The 1871 civil rights statute does not reach all constitutional injuries but only those caused by persons acting "under color of" state law. 42 U.S.C.A. §1983.

5. Civil Rights — 13.5(1)

Phrase "under color of" state law has secondary usage, not coterminous with "state action," defining character of conduct proscribed, within purview of 1871 civil rights statute. 42 U.S.C.A. §1983.

See publication Words and Phrases for other judicial constructions and definitions.

6. Civil Rights — 13.12(8)

Allegations that plaintiff's daughter and her husband through court proceedings and in deprivation of due process secured plaintiff's confinement in mental hospital did not allege conduct taken "under color of" state law, and thus did not state claim for relief under 1871 civil rights statute, despite contention that daughter initiated commitment proceedings in her official capacity as state-appointed guardian. 42 U.S.C.A. §1983; U.S.C.A.Const. Amends. 14, 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; Vernon's Ann.Civ.St. arts. 5547-27, 5547-31, 5547-33; V.A.T.S. Probate Code, §131(b).

7. Courts — 90(1)

One panel cannot overrule another.

Thomas L. Case, Louis P. Bickel, Dallas, Tex., for plaintiff-appellant.

Vial, Hamilton, Koch, Tubb, Knox & Stradley, Paul D. Schoonover, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

George L. Dahl, an elderly Texas widower, planned to remarry.[1] Dahl's daughter Gloria, fearing diversion of her father's estate, resolved to stop his remarriage. When filial remonstrances failed, Gloria resorted to the Texas courts. First, by means of false, ex parte representations that her father was incompetent, Gloria succeeded in having herself appointed his guardian. Tex.Prob.Code Ann. §131(b) (Vernon 1956). Second, again by means of false, ex parte representations, Gloria persuaded the Texas Mental Illness Court to issue a writ directing that her father be institutionalized forthwith. Tex.Rev.Civ.Stat.Ann. art. 5547-27 (Vernon Supp.1980). Thus armed with less process than would be necessary to seize a refrigerator, *see North Georgia Finishing, Inc. v. Di—Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), Texas peace officers dragged Dahl from his home and deposited him with Presbyterian Hospital in Dallas.

While her father was thus incarcerated, Gloria persuaded the Probate Court to permit her, as guardian, to take over his

---

[1] Our recitation of facts derives from the plaintiff's complaint. Since the district court dismissed pursuant to Fed.R.Civ.P. 12(b)(6), we present the plaintiff's conception of the case as if it were true. *E.g., Miree v. DeKalb County*, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492, 53 L.Ed.2d 557 (1977); *Walker Process Equipment, Inc., v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965).

residence. Meanwhile, in the Mental Illness Court, Gloria applied for "temporary hospitalization." Tex.Rev.Civ.Stat.Ann. art. 5547-31 (Vernon Supp.1980). To forestall a contest of that proceeding, she purported to waive, as guardian, personal notice to her father. Tex.Rev.Civ.Stat.Ann. art. 5547-33 (Vernon 1956). Fortunately for Dahl, who might otherwise be incarcerated to this day, certain of his acquaintances happened to see him being taken away and notified his attorneys. The scheme exposed, Dahl's attorneys secured both dismissal of the hospitalization proceedings and Dahl's release, following sixteen days of involuntary confinement. Approximately one month later, when a jury found that Dahl was competent, Gloria's guardianship also was dissolved.

For redress against his daughter, Dahl sought damages under 42 U.S.C.A. §1983 (West 1974)[2] and pendent Texas forms of action. In brief, Dahl charged that Gloria and her husband had caused him to be deprived of liberty and property without due process of law. U.S.Const. amend. XIV, §1, *construed in Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). To this was joined the familiar litany of state law torts, *i.e.*, abuse of process, false arrest, false imprisonment and malicious prosecution. On defendants' motion, the district court dismissed Dahl's complaint, Fed.R.Civ.P. 12(b)(6), on the statutory ground that defendants had not acted "under color of" state law. 42 U.S.C.A. §1983 (West 1974). Dahl appeals.

---

[2] 42 U.S.C.A. §1983 (West 1974) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[1-3] In determining whether Dahl has stated a claim cognizable under §1983, "[t]he first inquiry . . . is whether [he has alleged] . . . depri[vation] of a right 'secured by the Constitution and laws.' " *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 588, 62 L.Ed.2d 481 (1980), quoting *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). There can be no question, *compare Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), but that Dahl's complaint implicates a "liberty" interest of constitutional magnitude. *See Addington v. Texas*, 441 U.S. 413, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). Nor have we any trouble finding alleged injury to a constitutionally significant "property" interest. *E.g., Barry v. Barchi*, 443 U.S. 55, 64, n.11, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979); *Memphis Light, Gas & Water Divisions v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561, 56 L.Ed.2d 30 (1978). Matters concerning the deprivation of liberty and property without due process of law are governed by the Fourteenth Amendment and the Fourteenth Amendment protects only against state action. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Thus, before we can conclude that Dahl invokes rights "secured by" that amendment, we must also find an allegation that Texas was "involved in" their deprivation. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978).

At first blush, the requisite "state action" would here seem obvious. A Texas judge ordered Dahl stripped of control over all of his property; another Texas judge directed that Dahl be taken from his home and placed in a mental institution. But while such judicial action can constitute "state action" under the Fourteenth Amendment, *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79, 92 S.Ct. 1965, 1974, 32 L.Ed.2d 627 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 845, 92 L.Ed. 1161

(1948), it has never been held that all state court litigation must therefore result in dispositions that, if undertaken by state agents, would be constitutional. *See Bell v. Maryland*, 378 U.S. 226, 232, 84 S.Ct. 1814, 1818, 12 L.Ed.2d 822 (1964) (Black, J., dissenting); *Lombard v. Louisiana*, 373 U.S. 267,274, 83 S.Ct. 1122, 1125, 10 L.Ed.2d 338 (1963) (Douglas, J., concurring). To suggest otherwise would mean the end, save for those capable of self-help, of personal freedom "to be irrational, arbitrary, capricious, [or] even unjust." *Peterson v. City of Greenville*, 373 U.S. 244, 250, 83 S.Ct. 1119, 1133, 10 L.Ed.2d 323 (1963) (Harlan, J., concurring). Precisely when, as in *Shelley*, judicial involvement in private litigation assumes constitutional dimensions is a problem that has perplexed courts and scholars for decades. *See generally* W. Lockhart, Y. Kamsar, J. Chopper, Constitutional Law 1411-17 (4th ed. 1975). This case demands no definitive answer. It is enough to hold that, whatever other judicial action may constitute "state action," *cf. Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), a failure of procedural due process surely does.

It would be sufficient, to support this conclusion, merely to cite any number of Supreme Court cases that have so assumed. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). We wish to emphasize, however, what is for us the essential fact that "procedure" constitutes an inherently judicial responsibility. *Cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Notice, hearings, trial conduct — these are matters in respect of which courts are the principal, and often the only, state actors. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Although the Texas courts here purported merely to follow statutes, we think that the procedural nature of Dahl's claims

sets this case apart from those in which state courts are accused merely of enforcing substantive rights. *Compare District 28, United States Mine Workers v. Wellmore Coal Corp.*, 609 F.2d 1083 (4th Cir. 1979); *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974, 96 S.Ct. 2173, 48 L.Ed.2d 798 (1976); *Hardy v. Gissendaner*, 508 F.2d 1207 (5th Cir. 1975); *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1238, 28 L.Ed.2d 532 (1971); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969). Contrary to the results in these cases, we find that Dahl's complaint properly alleges state deprivation of liberty and property without due process of law, freedom from which constitutes a right "secured by the Constitution and laws." 42 U.S.C.A. §1983 (West 1974).

[4,5] The preceding conclusion does not end our inquiry, for the same reason that the "attachment" cases, *e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), do not. Section 1983 does not reach all constitutional injuries, but only those caused by persons acting "under color of" state law. The question remains, therefore, whether appellees' conduct can be so characterized. Preliminarily, we note that the phrase — "under color of" — has acquired two distinct usages, only one of which is relevant here. Most commonly, courts have equated "under color of" state law with the concept of "state action" under the Fourteenth Amendment. *See, e.g., United States v. Price*, 383 U.S. 787, 794, n.7, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966); *Tongol v. Usery*, 601 F.2d 1091, 1097 (9th Cir. 1979); *Braden v. University of Pittsburgh*, 552 F.2d 948, 955 n.34 (3d Cir. 1977) (en banc); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642n.3 (4th Cir. 1975); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028, 1031 n.6 (5th Cir. 1975);

Shirley v. State National Bank, 493 F.2d 739, 741 (2d Cir.), *cert. denied*, 419 U.S. 1009, 95 S.Ct. 329, 42 L.Ed.2d 284 (1974). This interpretation is apposite to finding state involvement, *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 174 n.44, 90 S.Ct. 1598, 1617, 26 L.Ed.2d 142 (1970); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 982-83 (5th Cir. 1979) (en banc), *cert denied*, ... U.S. ....., 100 S.Ct. 1339, 63 L.Ed.2d 777 (1980), or state function, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547, 92 S.Ct. 2238, 2243, 33 L.Ed.2d 122 (1972), in ostensibly private conduct. It is clear, however, that "under color of" state law has a secondary usage, not coterminous with "state action," defining the character of the conduct proscribed. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978); *Lavoie v. Bigwood*, 457 F.2d 7, 15 (1st Cir. 1972). It is this secondary usage, in light of the "state action" to which appellees unquestionably caused Dahl to be subjected, that concerns us here.

[6,7] Appellees are accused, in substance, of initiating lawsuits in bad faith. We may assume, arguendo, that their actions were tortious at state law. That would still be far removed from "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). *Cf. Williams v. Kelley*, 624 F.2d 695 (5th Cir. 1980) ("the sort of abuse of government power that is necessary to raise an ordinary tort by a government official to the statute of a violation of the Constitution"). It is not enough, where the state in no way compelled appellees' actions, *cf. Peterson v. City of Greenville*, 373 U.S. 244, 250-53, 83 S.Ct. 1119, 1134-1135, 10 L.Ed.2d 323 (1963) (Harlan, J. concurring), that they acted "with knowledge of and pursuant to" Texas statutes. *Flagg Bros., supra*, 436 U.S. at 156, 98 S.Ct. at 1733,

quoting *Adickes, supra*, 398 U.S. at 162 n.23, 90 S.Ct. at 1611 (Harlan, J.). "[U]nder 'color' of law means under 'pretense' of law." *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495 (1945) (plurality opinion), quoted in *Baldwin v. Morgan*, 251 F.2d 780, 786-87 (5th Cir. 1958). About the plaintiff, prosecution of a private lawsuit implies no "authority" or "pretense" beyond the First Amendment right of petition. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972). It follows that appellees' conduct, as alleged, was not taken "under color of" state law.[3]

See Torres v. First State Bank, 588 F.2d 1322, 1325-27 (10th Cir. 1978); *Wartman v. County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Sykes v. California*, 497 F.2d 197, 202 n.13 (9th Cir. 1974); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), *overruled on other grounds, Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 63 L.Ed.2d 777 (5th Cir. 1979) (en banc), *cert. denied*, ... U.S. ....., 100 S.Ct. 1339 (1980); *Antelman v. Lewis*, 480 F.Supp. 180, 185 (D.Mass.1979).[4]

AFFIRMED.

---

[3] Appellant argued that appellee initiated the commitment proceedings in her official capacity as state-appointed guardian, and thus acted "under color of" law. Factually, it is impossible to determine whether Mrs. Akin acted as guardian or a private citizen and relative when she proceeded against her father; she can claim either status. It is clear, however, that Tex.Rev.Civ.Stat.Ann. art. 5547-31 allows "any adult person" to initiate a commitment proceeding in Texas. Thus it cannot be assumed that Mrs. Akin acted in any official capacity.

[4] *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), involving provisional remedies, is not to the contrary. *Fuentes* was brought, not solely against a private state court litigant, but against the Florida Attorney General to enjoin enforcement of a statute. *Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), which enjoined enforcement of a private judgment, apparently is contrary both to our holding and to that in *Hill v. McClellan*,

supra, 490 F.2d at 860. *Henry* is not controlling, however, for at least three reasons: First, *Henry* did not adjudicate the merits of whether a §1983 suit would lie against private state court litigants, but merely whether there was sufficient merit to support a preliminary injunction. Second, *Henry* contains no discussion of whether the defendants were acting "under color of" state law, apparently confusing that requirement with the necessity for "state action." *Cf. Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Third, to the extent that it conflicts with *Hill*, *Henry* is simply questionable since, in this Circuit, one panel can not overrule another. *E.g., Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979); *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 79-1409

D. C. DOCKET NO. CA-3-78-0611-D

GEORGE LEIGHTON DAHL,

Plaintiff-Appellant,

v.

GLORIA DAHL AKIN and TED M. AKIN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 10, 1980

Issued as Mandate: December 5, 1980

No. 80-1325

MAR 19 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,
Petitioner,

versus

TED M. AKIN and GLORIA DAHL AKIN,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

PAUL D. SCHOONOVER
ATTORNEY OF RECORD
VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY
1500 Republic National Bank Tower
Dallas, Texas 75201
Telephone: (214) 748-4541
ATTORNEYS FOR RESPONDENTS

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

QUESTION PRESENTED FOR REVIEW

This case presents the question of whether the Akins, merely private persons, acted "under color of law" for the purposes of 42 U.S.C. §1983 by simply invoking state judicial processes and thereby obtaining orders affecting the liberty and property of the Petitioner, Dahl.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT 3

A. "State Action" and "Action Under Color of Law" Are Separate and Distinct Issues Under Section 1983 3

B. What Constitutes Action Under Color of Law by a Private State Court Litigant 7

C. Sound Public Policy Supports the Opinion Below 11

CONCLUSION 16

PROOF OF SERVICE 16

TABLE OF AUTHORITIES

CASES:

Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) 3,4,7,8,13

Antelman v. Lewis, 480 F.Supp. 180, 185-86 (D. Mass. 1979) 9,11

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES (Continued)

Page

Baer v. Baer, 450 F.Supp. 481, 486-88 (N.D. Cal. 1978) 9,11

Barnes v. Dorsey, 480 F.2d 1057, 1061 (8th Cir. 1973) 11

Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969) 11

Byrne v. Kysar, 347 F.Supp. 734, 736 (7th Cir. 1965) 11

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) 12

Coggins v. Carpenter, 468 F.Supp. 270, 282-83 (E.D. Pa. 1979) 9

Conley v. Gibson, 355 U.S. 41 (1957) 2

Dahl v. Akin, 630 F.2d 277 (5th Cir. 1980) 2,5

Dennis v. Hein, 413 F.Supp. 1137, 1140 (D.S.C. 1976) 13

Dennis v. Sparks, 101 S.Ct. 183 (1980) 9,10

Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977) 8

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) .. 4,8

Fuentes v. Shevin, 407 U.S. 99 (1972) 3,6,7

Girard v. Ninth Street and Fifth Avenue Corp., 369 F.Supp. 450, 455 (S.D.N.Y. 1975) 11

Green v. Truman, 459 F.Supp. 342, 344 (D. Mass. 1978) 9

TABLE OF AUTHORITIES (Continued)

Page

Grow v. Fisher, 523 F.2d 875, 879 (7th Cir. 1975) ..11

Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976) 10-11

Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), *overruled on other grounds, Sparks v. Duval County Land Co.*, 604 F.2d 976 (5th Cir. 1979) 11

Hohensee v. Daily, 383 F.Supp. 6 (M.D. Pa. 1974) ..11

Lefkowitz v. Lider, 443 F.Supp. 359 (D. Mass. 1978) .11

Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea v. Littleton*, 414 U.S. 488 (1974) 15

Martin v. Aubuchon, 623 F.2d 1282, 1285 (8th Cir. 1980) (per curiam) 14

McNally v. Pulitzer Publishing Co., 532 F.2d 68, 75 (8th Cir. 1976) 8-9

Mitchum v. Foster, 407 U.S. 225, 240 (1972) 15

Monroe v. Pape, 365 U.S. 167, 172 (1961) 14

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 6

Orlando v. Weizel, 443 F.Supp. 744 (W.D. Ark. 1978) 11

Phillips v. Fisher, 445 F.Supp. 552 (D. Kan. 1977) ..11

TABLE OF AUTHORITIES (Continued)

Page

Schetter v. Heim, 300 F.Supp. 1070 (E.D. Wis. 1969) 11

Shirley v. State Nat'l Bank, 493 F.2d 741 (2d Cir. 1974) 4

Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir. 1963) 11

Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978) 9

Smith v. Brookshire Bros., Inc., 519 F.2d 94, 97 (5th Cir. 1975) 9,13

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) 6

Sparks v. Duval County Land Co., 604 F.2d 976 (5th Cir. 1979), *aff'd sub nom. Dennis v. Sparks*, 101 S.Ct. 183 (1980) 11

Stevens v. Frick, 372 F.2d 378 (2d Cir. 1967) 11

Sykes v. California, 497 F.2d 197, 202 n.13 (9th Cir. 1974) 11

Taylor v. Nichols, 558 F.2d 561, 564 (10th Cir. 1977) 10

Torres v. First State Bank, 588 F.2d 1322, 1325-27 (10th Cir. 1978) 10

United States v. Price, 383 U.S. 787, 794 n.7 (1966) ..4,8

Wartman v. County Court, 510 F.2d 130, 134 (7th Cir. 1975) 11

TABLE OF AUTHORITIES (Continued)

Page

Weise v. Reisner, 318 F.Supp. 580 (E.D. Wis. 1970) ..11

Weiser v. Medical Care System, Inc., 432 F.Supp. 1148, 1152 (S.D.N.Y. 1956) 11

CONSTITUTION:

U.S. CONST., Amend. I 12

STATUTES:

28 U.S.C. §1257 6

42 U.S.C. §1983 .....*passim*

No. 80-1325

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,
Petitioner,

versus

TED M. AKIN and GLORIA DAHL AKIN,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

To the Honorable Chief Justice of the
United States and the Associate Justices
of the Supreme Court of the United States:

Respondents Ted M. Akin and Gloria Dahl Akin (the "Akins") respectfully pray that Writ of Certiorari be

denied herein. The decision of the Fifth Circuit is correct and is not in conflict with decisions of this Court or other Courts of Appeals.

STATEMENT OF THE CASE

The Akins generally agree with Petitioner's Statement of the Case, but object to his characterizations included therein, particularly his statement of the purpose of the state court actions initiated by the Akins (Petitioner's Brief at p. 2). To the extent Dahl's Statement of the Case purports to be a summary of his Amended Complaint, the Akins understand that in this proceeding, which is an appeal from a dismissal for failure to state a claim, they and this Court must accept the factual allegations of the Amended Complaint as true. *Conley v. Gibson*, 355 U.S. 41 (1957). Of course, it is only in this strict legal sense that the Akins can be said not to dispute Dahl's allegations. Also, the merits *vel non* of Dahl's claims of constitutional deprivation are not involved herein, and no response thereto, legal or factual, will be made by the Akins. It should be noted that contrary to Dahl's assertion in his Brief, the Fifth Circuit did not hold that Dahl was deprived of liberty and property without due process of law or that the Texas Probate Court and the Texas Mental Health Code are unconstitutional (Petitioner's Brief at p. 4). The Fifth Circuit merely held that Dahl's Amended Complaint *stated a claim* for deprivation of rights secured by the Constitution. *See Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980).

Reduced to its essentials, Dahl's Amended Complaint claims that the Akins conspired with each other to deprive him of liberty and property through the use or abuse of the Texas probate or guardianship machinery. In the course of this alleged conspiracy, the Akins are said to have taken advantage of such machinery, including the Texas procedure permitting the ex parte appointment of a temporary guardian without notice. (R. 84, ¶ 15). This procedure and the statute authorizing it are alleged to be unconstitutional as failing to afford minimum procedural due process under *Fuentes v. Shevin*, 407 U.S. 99 (1972). The Akins were not alleged to be anything other than private persons, although their resort to the state courts does appear on the face of the Amended Complaint. Only conspiracy between the Akins themselves was asserted; there were no allegations of conspiracy between the Akins and state officials (Transcript of Proceedings at p. 21, lines 16-19; R. 76, ¶ 3).

ARGUMENT

A. "State Action" and "Action Under Color of Law" Are Separate and Distinct Issues Under Section 1983

This Court in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970), held that there are two separate elements necessary to recovery under Section 1983:

> First, the Plaintiff must prove that the Defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of his constitutional right 'under color of any statute, ordinance, regulation, custom or usage of any state or territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'

Some earlier opinions of this Court and some post-*Adickes* lower federal court opinions state that the "state action" and "under color of law" requirements are synonomous. *See, e.g.: United States v. Price*, 383 U.S. 787, 794 n.7 (1966); *Shirley v. State Nat'l Bank*, 493 F.2d 741 (2d Cir. 1974). However, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978), this Court explained the distinction between the two elements[1] of a Section 1983 claim:

> Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. See *e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-24, 88 S.Ct. 2186, 2194-95, 20 L.Ed.2d 1189 (1968) (discussing 42 U.S.C. §1982). Although a private person may cause

---

1 This Court noted that when the defendant is a public official (and presumably acting in such capacity), "the two elements of a §1983 action merge." 436 U.S. at 157 n.5. The Akins were not alleged to have acted in any official capacity.

> a deprivation of such a right, he may be subjected to liability under Section 1983 only when he does so under color of law. Cf. 392 U.S., at 424-25 and n.33, 88 S.Ct. at 2195. However, most rights secured by the Constitution are protected only against infringement by governments. See *e.g., Jackson* [*v. Metropolitan Edison Co.*], 419 U.S., at 349, 95 S.Ct. at 452; *Civil Rights Cases*, 109 U.S. 3, 17-18, 3 S.Ct. 18, 25-26, 27 L.Ed. 835 (1883). Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law.

In the opinion below, the Fifth Circuit correctly distinguished between these two elements of a Section 1983 claim and held with respect to the first element, that Dahl's Amended Complaint properly alleged a state deprivation of liberty and property without due process of law, freedom from which constitute a right secured by the Constitution. *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980). Despite this partial victory, much of Dahl's Petition for Writ of Certiorari is directed to a showing that *state action* is present when a state court's orders reach out and seize a person or a person's property. At this stage of the proceeding, which is an appeal from a dismissal on the basis of a failure to state a claim upon which relief can be granted, the Akins do not dispute that Dahl has properly alleged the existence of

state action. However, further discussion of this issue in this Court in light of the Fifth Circuit's agreement with Dahl can only serve to further confuse the very distinct concepts of state action and action under color of law. Indeed the cases most heavily relied upon by Dahl are "state action cases, not cases involving the issue of whether the private defendants acted under color of law. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); and *Fuentes v. Shevin*, 407 U.S. 67 (1972). Neither *North Georgia* nor *Sniadach* involved Section 1983. Both cases originated in state courts and reached this Court via 28 U.S.C. §1257. Thus, although in considering the due process claims in each of these cases, this Court implicitly found state action (which is a requisite to a due process violation), nevertheless, the requirement of action under color of law under Section 1983 could not possibly have been considered by this Court. Although *Fuentes* was pled as a Section 1983 claim, upon review by this Court the only issue was whether the lower court's dismissal was proper. The lower court had found that the Plaintiff's complaint failed to allege the deprivation of a Fourteenth Amendment right and accordingly held that the complaint should be dismissed for the failure to satisfy the first element required for a Section 1983 claim. This Court disagreed, and found a due process violation was alleged. Thus, the case was remanded for further consideration, and this Court did *not* hold that the one private creditor-defendant who set the wheels of the state judiciary in motion had taken action under color of law.

Further *Fuentes* only involved a request for declaratory and injunctive relief, and the primary defendant therein was the Attorney General of the State of Florida.

Therefore, when Dahl says in his Petition that the "facts of this case are indistinguishable from those of the creditor cases" (Petitioner's Brief at p. 8), he fails to understand that those cases only involved a determination of the existence of state action and wholly failed to speak to the issue of whether action under color of law was present.

B. What Constitutes Action Under Color of Law by a Private State Court Litigant

In *Adickes v. S. H. Kress & Co.*, 398 U.S. at 161 n.23, this Court set forth the *minimum* requirements in order to show action under color of law by a private person: *"Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of Section 1983, . . .* we think it is essential that he act with the knowledge of and pursuant to that statute [emphasis added]." Contrary to Dahl's statement in his Brief at page 12, this Court has never held that a plaintiff's allegation of this bare minimum will in fact satisfy the action under color of law element. Indeed, the quoted statement from *Adickes* indicates that the Court itself contemplated some additional requirements.

This reservation of what additional facts would be necessary to allege action under color of law under Sec-

tion 1983 continued in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156: "Certainly, the complaints can be fairly read to allege such knowledge on the part of Flagg Brothers, however, we need not determine whether any further showing is necessary, ..."

Earlier, in *United States v. Price*, 383 U.S. 787, 794 (1966), the Court stated:

> Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant* in *joint activity* with the State or its agents [emphasis added].

Accordingly, in *Adickes*, this Court held that the plaintiff would be entitled to relief under Section 1983 "if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow *reached an understanding* to deny Miss Adickes service in the Kress store . . . ." 398 U.S. at 152 [Emphasis added]. Lower courts have consistently interpreted these opinions to require an actual conspiracy or knowing in concert action between the private defendant and the state officials in order to constitute action under color of law. *See Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977) ("customary plan"); *McNally v. Pulitzer Publishing Co.*, 532

F.2d 68, 75 (8th Cir. 1976); *Slavin v. Curry*, 574 F.2d 1256, 1265 (5th Cir. 1978); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 94 (5th Cir. 1975) ("preconceived plan"); *Antelman v. Lewis*, 480 F.Supp. 180, 185-86 (D. Mass. 1979); *Coggins v. Carpenter*, 468 F.Supp. 270, 282-83 (E.D. Pa. 1979); *Green v. Truman*, 459 F.Supp. 342, 344 (D. Mass. 1978); *Baer v. Baer*, 450 F.Supp. 481, 486-88 (N.D. Cal. 1978).

Recently, in *Dennis v. Sparks*, 101 S.Ct. 183 (1980), this Court once again addressed the question of what degree and type of participation by a private person in state action is necessary to give rise to action under color of law within the meaning of the phrase as used in Section 1983. *Dennis* was decided one week after the Fifth Circuit rendered the opinion below, and, therefore, the Fifth Circuit did not have the benefit of this Court's reasoning therein. However, *Dennis* is consistent with and supportive of the opinion below.

In *Dennis* the Court overturned the so-called "derivative immunity" doctrine which had held that a Section 1983 action against private persons accused of conspiring with a judge or other wholly immune state official cannot be maintained on the basis that as a matter of law the Plaintiff could not allege that the private defendants were acting under color of state law. In this context, one in which private persons were alleged to have been jointly engaged with state judicial officials in a deprivation of the Plaintiff's Fourteenth Amendment rights, the Court once again noted that it was

enough that the private person be a *willful participant* in *joint action* with the state or its agents. In *Dennis* it was alleged that the private person actually bribed the state judge and entered into a conspiracy to injure the plaintiff. In holding that such allegations properly alleged action under color of state law by the private defendants, the court stated significantly: *"Of course, merely resorting to the courts and being on the winning side of the lawsuit does not make a party a co-conspirator or a joint actor with the judge."* 101 S.Ct. at 186 [emphasis added]. Therefore, this Court in *Dennis* has clearly indicated that the "willful participation" in "joint activity" with state officials requires some meeting of the minds and common understanding of a prohibited purpose. Suing another in a state court is not the kind of activity by a private person intended to be within the ambit of Section 1983. Indeed, the Court would likely not have abolished the doctrine of "derivative immunity" had less eggregious "joint activity" between the private defendants and the state judge been alleged.

Accordingly, when a private litigant merely invokes the processes of the state courts, and the state action involves the application of neutral state statutes, the private litigant cannot be said to have acted under color of law even if the constitutional rights of the federal court plaintiff be thereby abridged in some manner. This holding is consistent with numerous prior decisions of circuit and district courts. *See Torres v. First State Bank*, 588 F.2d 1322, 1325-27 (10th Cir. 1978); *Taylor v. Nichols*, 558 F.2d 561, 564 (10th Cir. 1977); *Harley v. Oli-*

ver, 539 F.2d 1143 (8th Cir. 1976); *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975); *Wartman v. County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Sykes v. California*, 497 F.2d 197, 202 n.13 (9th Cir. 1974); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), *overruled on other grounds, Sparks v. Duval County Land Co.*, 604 F.2d 976 (5th Cir. 1979); *Barnes v. Dorsey*, 480 F.2d 1057, 1061 (8th Cir. 1973); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Stevens v. Frick*, 372 F.2d 378 (2d Cir. 1967); *Byrne v. Kysar*, 347 F.Supp. 734, 736 (7th Cir. 1965); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir. 1963); *Antelman v. Lewis*, 480 F.Supp. 180, 185 (D. Mass. 1979); *Orlando v. Weizel*, 443 F.Supp. 744 (W.D. Ark. 1978); *Baer v. Baer*, 450 F.Supp. 481 (N.D. Cal. 1978); *Lefkowitz v. Lider*, 443 F.Supp. 359 (D. Mass. 1978); *Phillips v. Fisher*, 445 F.Supp. 552 (D. Kan. 1977); *Girard v. Ninth Street and Fifth Avenue Corp.*, 369 F.Supp. 450, 455 (S.D.N.Y. 1975); *Hohensee v. Daily*, 383 F.Supp. 6 (M.D. Pa. 1974); *Weise v. Reisner*, 318 F.Supp. 580 (E.D. Wis. 1970); *Schetter v. Heim*, 300 F.Supp. 1070 (E.D. Wis. 1969); *Weiser v. Medical Care System, Inc.*, 432 F.Supp. 1148, 1152 (S.D.N.Y. 1956).

C. Sound Public Policy Supports the Opinion Below

Sound public policy supports the Fifth Circuit's refusal to hold that a private state litigant acts under color of law for the purposes of Section 1983 by merely availing himself of a state's judicial processes. A state court is presumed to be impartial and neutral in the conduct of civil litigation. Persons should be encour-

aged to seek resolution of disputes in such forums. Indeed, the right to do so is protected by the First Amendment. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Indeed, a construction of Section 1983 that would subject a private state litigant to liability for damages anytime an unconstitutional statute is relied upon or an unconstitutional procedure is employed by state courts would raise a serious question concerning the constitutionality of Section 1983 and should, therefore, be avoided.

It is true that when a private litigant obtains relief in the state courts, the state's coercive power is thereby placed behind litigant. However, if the state court defendant is being deprived of his constitutional rights in some manner by virtue of the exercise of the state court's coercive power, it is the state, not the private litigant, that is causing such deprivation. This is so unless there is a conspiracy between the private litigant and state judicial officials. Perhaps an example using the executive branch of government will make this point more clearly. It has been generally held, as noted above, that a private person does not act under color of state law (absent discriminatory "in concert" action with state officials) when he causes the arrest or detention by state officials of another person. In such an episode, there may clearly be state action because of the intervention of state officials to actually effect the arrest or detention of the potential civil rights plaintiff, but the courts hold that the private complainant does not act under color of law. So, if the citizen causes

the arrest of another by a state action (whether under an unconstitutional or a constitutional statute), he is not acting under color of law, then *a fortiori* a state court plaintiff who obtains a dispositive order should not be held to have acted under color of state law. In other words, there are many instances in which a private person may start the wheels of state government to move against another person, resulting in the deprivation of such person's constitutional rights. However, if the complainant is indeed a private person (and not a state functionary), there is only one method by which such person may be held liable under Section 1983 — *i.e.*, when the private individual "jointly engages or conspires with a state official to deprive a plaintiff of his constitutionally protected rights. Such conspiracy or joint activity causes the private individuals' acts to be considered as having been taken under color of state law." *Dennis v. Hein*, 413 F.Supp. 1137, 1140 (D.S.C. 1976), citing *Adickes*. As Judge Gee stated in his dissent in *Smith v. Brookshire Bros., Inc.*, 519 F.2d 94, 97 (5th Cir. 1975): "The vision of a citizen's hesitating to call for police assistance in fear they may, when they arrive, employ some unconstitutional procedure over which he has no control and thus render him liable in a Section 1983 action is not an attractive one." Similarly, the vision of a citizen's resort to self-help (potentially violent), rather than resort to his state's judicial process to resolve the controversies in fear of liability under Section 1983 in the event the state courts employ an unconstitutional procedure or render unconstitutional

judgments, is not an attractive one. In the absence of conspiracy between private litigants and state executive or judicial officers, such private litigants should not be deemed to be acting "jointly" or "in concert" with state officials or otherwise acting under color of state law for Section 1983 purposes by merely attempting to peacefully work out their controversies in a judicial form. In no sense can a private litigant who happens to obtain a state court judgment be deemed to carry the state's "badge of authority" for the purposes of Section 1983. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

Dahl's complaint with regard to the Texas statutes is that they fail to provide adequate notice and hearing prior to confinement and other deprivation of rights. In light of the foregoing authorities, it would be absurd to hold the Akins, purely private individuals, responsible for the failure of the Texas Legislature or the Texas courts to provide any constitutionally required notice to Dahl. *See Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980) (per curiam) ("there is no showing these nonjudicial persons were under any duty to provide notice or advise [the plaintiff] of his legal rights").

In summary, it is submitted that the dismissal of Dahl's amended complaint was justified, because it appears beyond a doubt that Dahl could prove no set of facts in support of his claims which would entitle him to relief. This, of course, does not mean that Dahl is with-

out a remedy. He may urge his constitutional defenses in the state courts, and in the event the state courts do not sufficiently protect his federal constitutional rights, he may seek review by this Court via certiorari. Or, given the overt governmental action, he may seek injunctive relief against the appropriate state officials, subject to equitable principles and principles of federalism. *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (Section 1983 was passed to enforce the provisions of the Fourteenth Amendment against all state action, including *judicial* action); *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea v. Littleton*, 414 U.S. 488 (1974) (state executive and judicial officials, though qualifiedly and wholly immune to Section 1983 damage claims, respectively, are not immune to suits for injunctions). These are the routes mandated by the Constitution and our system of federalism, recognizing that state courts are as capable of adjudicating federal constitutional defenses as federal district courts. This is the path which the body of law under the concept of action under color of law requires Dahl to take. A decision that the Akins acted under color of law in availing themselves of the neutral state forums would substantially and unwisely widen the pathway to federal court and encourage unwarranted intrusion into the state judicial process inconsistent with the principles of federalism enunciated by this Court.

CONCLUSION

For the foregoing reasons, the Akins respectfully request that the Petition for Writ of Certiorari be denied. In the alternative, the Akins respectfully pray that the Writ of Certiorari be granted and that the opinion below be summarily affirmed.

Respectfully submitted,

PAUL D. SCHOONOVER
Attorney of Record

VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY
1500 Republic National Bank Tower
Dallas, Texas 75201
Telephone: (214) 748-4541

ATTORNEYS FOR RESPONDENTS

PROOF OF SERVICE

I, PAUL D. SCHOONOVER, attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief of Respondents in Opposition have been mailed on the ____day of March, 1981, to Thomas L. Case of Bickel and Case, 5441 First International Building, Dallas, Texas 75270, attorney for Petitioner.

PAUL D. SCHOONOVER